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IN THE

Supreme Court of the United States

ANTON GEISER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Third Circuit err in holding that this Court through its *Chevron* jurisprudence has "altered" the "approach" to statutory interpretation prescribed by *Fedorenko v. United States*, 449 U.S. 490 (1981), so as to prohibit consideration at Step 1 of evidence regarding the State Department's interpretation of an immigration statute?

2. Where a visa was issued in accordance with a "uniform interpretation" of an immigration statute developed by the State Department pursuant to the express delegation of authority contained in Section 104 of the Immigration and Nationality Act ("INA"), may a court some fifty years later disregard that interpretation and deem the visa to have been "illegally procured" in violation of INA § 340(a)?

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DECISIONS ENTERED IN CASE

United States v. Geiser, 2006 WL 2847423 (W.D. Pa. Sept. 29, 2006), *aff'd*, 527 F.3d 288 (3d Cir. 2008).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the judgment and opinion entered by the Third Circuit on June 10, 2008, as to which the Third Circuit denied the petition for rehearing and rehearing en banc on August 20, 2008. The Petition is timely under Supreme Court Rules 13(1) and 13(3).

PERTINENT STATUTES AND REGULATION

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Ch. 477, 66 Stat 1009, *codified as amended*, 8 U.S.C. § 1001 *et seq.* ("INA").

Sec. 104(e):

> There shall be a General Counsel of the Visa Office . . . . The General Counsel shall have authority to maintain liaison with the appropriate officers of the Service with a view to securing uniform interpretations of the provisions of this Act.

Sec. 340(a):

> It shall be the duty of the United States attorneys for the respective districts . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, *amended by*, Pub. L. No. 83-751, 68 Stat. 1053 (1954) ("RRA").

Sec. 7(b):

> Any alien admitted under this Act and subsequently determined to have been inadmissible under the provisions of this Act at the time of entry shall, irrespective of the date of his entry, be taken into custody and deported . . . .

Sec. 11(c):

> No person shall be issued a visa . . . under this Act unless . . . the applicant has established his eligibility for a visa . . . under this Act and under the immigration laws and regulations . . . .

Sec. 14(a):

> No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

8 C.F.R. § 42.42(j)(2) (1953):

> An alien who was convicted of being a war criminal, or who was properly charged as such but who escaped trial or punishment by departing the jurisdiction, or an alien who was guilty of, or who advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of a power which was at war with the United States during World War II may be considered ineligible to receive a visa under the provisions of section 212(a)(29) of the act.

STATEMENT OF THE CASE

The United States commenced this action on August 9, 2004, by filing a single count complaint seeking denaturalization of Petitioner Anton Geiser. The Complaint does not allege that Geiser procured his citizenship by "concealment of a material fact or by wilfull misrepresentation," in violation of INA § 340(a). Instead, the Complaint alleges that, strictly

by virtue of his status as a former concentration camp guard, Geiser was "legally ineligible to receive a visa to enter the United States under RRA Section 14(a)," Complaint ¶ 32, and therefore was legally ineligible to naturalize pursuant to INA § 316(a). Complaint ¶¶ 33 & 34. According to the government, Geiser's "citizenship thus was illegally procured and must be revoked, as provided in INA Section 340(a) . . . ." Complaint ¶ 35.

The parties filed cross motions for summary judgment. The United States District Court for the Western District of Pennsylvania granted the government's motion for summary judgment and denied Geiser's motion for summary judgment. The district court held that Section 14(a) of the RRA unambiguously prohibited the issuance of an RRA visa to any former concentration camp guard. *Geiser*, 2006 W.L. 2847423 at * 6. Based on its reading of Section 14(a), the district court held that the case must be decided at *Chevron* "Step 1" and declined either to accord deference to the "State Department's decisions to grant visas to former concentration camp guards" or to "reach Geiser's contention that the State Department had in fact adopted a policy of granting visas to former Nazi concentration camp guards who were not war criminals." *Geiser*, 2006 WL 2847423 at * 6.[1] The district court quoted with

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[1] While a Judge of the United States Court of Appeals for the Third Circuit, Justice Alito outlined the methodology prescribed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> Chevron applies when "'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *United States v. Mead Corp.*, 553 U.S. 218, 226

approval the Eighth Circuit's observation that an "'*ultra vires* agency decision to grant [a former concentration camp guard] a visa is due no deference." *Id.* (*quoting United States v. Friederich*, 402 F.3d 842, 846 n. 5 (8th Cir. 2005)).

The Third Circuit affirmed. 527 F.3d at 299. The Court of Appeals rejected Geiser's argument that RRA § 14(a) was textually ambiguous. The court reasoned that the terms "personally" and "persecution" as used in Section 14(a) of the RRA are unambiguous. *Geiser*, 527 F.3d at 288.[2]

Geiser also argued that, in light of the provisions of the RRA incorporating by reference the INA and its regulations, *see* RRA §§ 11(b), 11(c) & 15, the RRA could be deemed to be structurally ambiguous. Geiser proffered an alternative reading of the statutory scheme under which the phrase "personally advocated or

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(2001). If Chevron applies, a court must ask (at what is customarily called step one) "whether Congress has so directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004) (*quoting Chevron*, 467 U.S. at 842-43). "However, whenever Congress has 'explicitly left a gap for the agency to fill,'" a court must proceed to step two, and "the agency's [interpretation] is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" (*quoting Chevron*, 467 U.S. at 843-44). The Court has described this test as one of reasonableness. See Chevron, 467 U.S. at 845, 865, 866.

Chen v. Ashcroft, 381 F.3d 221, 223-24 (3d Cir. 2004) (parallel citations omitted).

[2] The district court had federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345 & 1451(a). The Third Circuit had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. *See* Sup. Ct. R. 14(g)(ii).

assisted in the persecution" as used in RRA § 14(a) could be deemed to be synonymous with the phrase "war criminal, or [person] who was properly charged as such but who escaped trial or punishment by departing the jurisdiction, or an alien who was guilty of, or who advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of a power which was as war with the United States during World War II" as used in the 8 C.F.R. § 42.42(j)(2) (1953).

The Third Circuit rejected Geiser's proposed reading because, in the court's view, "the most natural reading" of the word "and" as used in RRA § 11(c) is in its "plain conjunctive sense." *Geiser*, 527 F.3d at 298. According to the Third Circuit the word "and" in RRA § 11(c) "signifies that applicants such as Geiser had to satisfy two sets of requirements: those of the INA (and its associated regulations) and those of the RRA." *Geiser*, 527 F.3d at 298.

The Third Circuit also rejected Geiser's argument that *Fedorenko v. United States*, 449 U.S. 490 (1981), required consideration of evidence regarding the interpretation of the RRA employed by the State Department during the mid-1950s when it issued Geiser's visa. *Geiser*, 527 F.3d at 293. The Third Circuit explained: "Even if *Fedorenko* did consider legislative history when initially construing the statute's meaning, this approach was altered by the Supreme Court's *Chevron* jurisprudence which now controls our analysis of the RRA." 527 F.3d at 293.

The Third Circuit subsequently denied Geiser's petition for rehearing and rehearing en banc. Circuit Judge Roth, a member of the original three judge panel, limited her vote on the petition to "panel rehearing only." Appendix C at 39a.

REASONS FOR GRANTING THE PETITION

The tension between the Third Circuit's present interpretation of the RRA and the available evidence regarding the State Department's historical interpretation generates novel and important federal issues. These issues justify the granting of certiorari pursuant to Supreme Court Rule 10(c).

1. The Third Circuit Erred by Failing To Consider the Range of Interpretations Available to the State Department in the Exercise of its Interpretive Authority Under INA § 104

The central flaw in the Third Circuit's reasoning is its failure to consider INA § 104 as part of its Step 1 analysis.[3] The existence of such a sweeping express delegation of interpretive authority sets out Congress's intent as to the appropriate role of the State Department. *See United States v. Morton*, 467 U.S. 822, 834 (1984); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). *See also Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2008).

Once INA § 104 is considered as part of the RRA statutory framework, it is clear that the process of State Department "interpretation" is as much a part of that framework as RRA § 14(a) itself. The statutory scheme contemplates not that a court will years after the fact determine the "most natural reading," *Geiser*, 527 F.3d at 298, but instead grants the State Department authority to develop "interpretations,"

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[3] The Third Circuit's opinion contains a single reference to Section 104, 527 F.3d at 298, but offers no substantive discussion of that provision. The context suggests that this reference in the opinion was a typographical error.

INA § 104(e), to be applied "at the time of entry." RRA § 7(b).

In order to proceed to Step 2, Geiser need only show that his proposed interpretation of the statutory scheme is "within the bounds of reason." *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967, 983 (2005) ("*NCTA*"). Geiser's proposed reading of the statutory scheme, under which RRA § 14(a) would be deemed to be synonymous with 8 C.F.R. § 42.42(j)(2) (1953), is at least "within the bounds of reason." While this may not in the Third Circuit's view be the "most natural reading," *Geiser*, 527 F.3d at 298, it is at least a "reasonable" and "ordinary" usage, *NCTA*, 545 U.S. at 988, particularly when considered in light of INA § 104(e) and the sweeping deference normally accorded to the Executive Branch in relation to immigration matters.[4]

That Geiser's proffered interpretation is "within the bounds of reason," *NCTA*, 545 U.S. at 988, is strongly supported by the available historical evidence regarding the interpretation actually developed by the State Department in the mid-1950s. None of this evidence has even been considered because the district court and the Third Circuit have declined to examine the historical record. Just as the *Fedorenko* court faulted the district court for ignoring the

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[4] *E.g.*, *Kleindienst v. Mandell*, 408 U.S. 753, 768 (1972). *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)(*Chevron* deference owed to Board of Immigration Appeals interpretation of serious nonpolitical crime exception to statute otherwise granting withholding of deportation to alien facing risk of persecution; "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'") (citation omitted).

"uncontroverted testimony about how the Act was interpreted by the officials who administered it," *Fedorenko*, 449 U.S. at 749-50, the courts below have decided this case without considering the available evidence concerning the State Department's contemporaneous interpretation of the RRA.

2. The Third Circuit Erred in Holding that this Court has "Altered" the *Fedorenko* "Approach"

The Third Circuit's suggestion that *Chevron* superceded *Fedorenko* is not persuasive. *Geiser*, 527 F.3d at 293. *Chevron* did not announce an entirely new set of rules of statutory construction but instead relied in part on cases pre-dating *Fedorenko*. *Chevron*, 467 U.S. at 842-43 & n.9. In *Fedorenko* the Court found the meaning of the Displaced Persons Act of 1948, Pub. Law No. 80-774, Ch. 647, 62 Stat. 1009 ("DPA") to be "plain" but nonetheless deemed it entirely appropriate to discuss the State Department's interpretation of the DPA as part of its analysis as to whether the guard in that case was eligible for a DPA visa. *Fedorenko*, 449 U.S. 513-14. Nothing in *Chevron* indicates that this approach does not continue to be valid.

The more recent *Chevron* decisions cited by the Third Circuit, *Geiser,* 527 F.3d at 288, do not support the Third Circuit's conclusion that the Court has "altered" the "approach" followed in *Fedorenko*. The cited cases stand only for the proposition that an agency may not overturn a clear directive from Congress. But these cases also hold that where a congressional mandate for agency interpretation is to be found, that mandate must be honored. Thus, in *Zuni Public School District No. 89 v. Department of Education,* 550 U.S. 81, 127 S. Ct. 1534 (2007), the

Court held that the "general language of the statute . . . leaves the Secretary with the authority to resolve such subsidiary matters at the administrative level." 127 S. Ct. at 1545.

The Third Circuit's approach is itself inconsistent with *Chevron*. The Court of Appeals reasoned that the RRA must impose a higher standard than the INA because Congress used the word "and" rather than "or" in RRA § 11(c). *Geiser*, 527 F.3d at 298. Even the decision relied upon by the Third Circuit on this point recognizes that that this rule is merely a presumption and does not control if "'the context dictates otherwise.'" *Id.* (quoting *Reese Brothers, Inc. v. United States*, 447 F.3d 229, 236 (3d Cir. 2006)). Here the "context," that is, the entire statutory scheme including INA § 104 and the interpretive role of the State Department recognized in *Fedorenko*, argues strongly against application of a presumption that operates to prevent consideration of potential interpretations within the "bounds of reason." *NCTA*, 545 U.S. at 983.

Particularly in light of INA § 104, the Court of Appeals should have explored all available readings of the statute within the "bounds of reason" with due consideration as to whether the proffered interpretation was the agency's interpretation. Such an approach is routine even in cases decided at *Chevron* Step 1. *See Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 131 (2002) (discussing agency's "convincing explanation" of statute determined to have "plain" meaning).

The Third Circuit has as a practical matter read the State Department's interpretive authority out of the statute by limiting its Step 1 analysis to the one statutory reading it deemed "most natural." The

"most natural" standard amounts to a reasonableness analysis, which should only be conducted at Step 2. Such an approach by no means eliminates a court's ability to overturn an interpretation if it is deemed to be unreasonable, but this analysis should be conducted at Step 2 in the context of the complete historical record.

3. The Third Circuit's Decision Results in an Untenable Definition of the Term "Illegally Procured" in INA § 340(a)

This Court has on a few occasions alluded to the possibility that a visa might be deemed to have been "illegally procured" in the absence of any claim of misrepresentation.[5] The Court has never even approached the Third Circuit's holding that a court may retroactively deem a visa to have been unlawfully procured notwithstanding evidence of a contemporaneous State Department "policy" authorizing issuance of the visa. *Geiser*, 527 F.3d at 294.

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[5] *See, e.g., Schneiderman v. United States*, 320 U.S. 118 (1943) (reversing order of denaturalization based on alleged "unlawful procurement" without misrepresentation based on government's inability to prove beyond a reasonable doubt that citizen was not attached to principles of Constitution at time of naturalization.) *See also Kungys v. United States*, 485 U.S. 759, 799 & n.11 (1988) (concurring opinion of Stevens, J.) (discussing relationship between "misrepresentation and illegally procured clauses" of INA § 340(a)). *See generally* Gordon, Mailman, & Yale-Loehr, 7 Immigration Law and Procedure § 96.10[3], at 96-45 (2004) ("Prevailing judicial and administrative attitudes make it unlikely that a denaturalization suit will ordinarily be brought on a charge of illegal procurement unless it is coupled with a charge of concealment or misrepresentation.").

The Third Circuit's decision leads to an untenable reading of the term "illegally procured" in INA § 340(a). Under the Third Circuit's analysis, a court could deem an alien to have "illegally procured" a visa even though the General Counsel of the Visa Office and the other members of the Foreign Service had at the time of its issuance "secur[ed]" a "uniform interpretation," INA § 104(e), providing that the alien was legally eligible for the visa. Such a reading defies common sense and is inconsistent with RRA § 7(b), which provides that visa eligibility is to be determined "at the time of entry."

CONCLUSION

The Third,[6] Seventh[7] and Eighth[8] Circuits have now each assumed the power of a court to ignore and, in effect, reverse the State Department's "policy." These courts have arrived at this facially implausible result under the theory that the State Department's policy was either "*ultra vires*" or irrelevant in light of *Chevron*. Each of these decisions – unique to the context of concentration camp guards granted RRA visas – is flawed because it fails to respect the State Department's established and statutorily-mandated authority to render "interpretations" of the immigration laws. INA § 104(e). This authority was respected in *Fedorenko* and should be respected here.

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[6] The Third Circuit noted that application of the RRA presented an issue of "first impression" in the Third Circuit. *Geiser*, 527 F.3d at 297.

[7] *United States v. Kumpf*, 438 F.3d 785 (7th Cir. 2006).

[8] *United States v. Hansl*, 439 F.3d 850 (8th Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 318 (2006); *United States v. Friederich*, 402 F.3d 842 (8th Cir. 2005), *cert. denied*, 546 U.S. 961, *reh. denied*, ___ U.S. ___, 127 S. Ct. 318 (2006).

This Court should grant certiorari in order to address the several important federal questions raised by this line of erroneous decisions.

Respectfully submitted,

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